Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554



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| In the Matter of | ) | |
| | ) | |
| Implementation of the Cable Television | ) | |
| Consumer Protection and Competition | ) | CS Docket No. 01-290 |
| Act of 1992 | ) | |
| | ) | |
| Development of Competition and Diversity | ) | |
| in Video Programming Distribution: | ) | |
| Section 628(c)(5) of the Communications Act | ) | |
| | ) | |
| Sunset of Exclusive Contract Provision | ) | |

# REPLY COMMENTS OF THE RURAL INDEPENDENT COMPETITIVE ALLIANCE

The Rural Independent Competitive Alliance ("RICA") submits its Reply Comments in the above-referenced proceeding, in which the Commission is considering whether the public interest would be served by allowing the current statutory ban on cable operators entering into exclusive contracts with their vertically integrated program suppliers, set forth in Section 628(c)(2)(d) of the Communications Act,[1] to expire on the "sunset" date of October 5, 2002. The comments filed in this proceeding as well as very recent announcements of even greater consolidation in the video market strongly support retaining the ban, rather than allowing it to expire.

As the filing parties point out, the video market remains dominated by a handful of large cable operators and satellite carriers. In this environment, and notwithstanding the ban on exclusive contracts between vertically integrated cable operators and programmers, competitors

[1] 47 U.S.C. Sec. 548(c)(2)(d).

face discrimination in access to critical programming and in the pricing of programming. These conditions make it difficult, if not impossible for new entrants and smaller systems to compete. If the limited ban against exclusive contracts contained in Section 628 were to be lifted, the likelihood that there would be more access and pricing discrimination, not less, is the only logical conclusion that the Commission can reach, based on the record.

In view of the record evidence, and in light of recent announcements of more consolidation in the video market, the Commission should conclude that allowing the ban on exclusive contracts to expire does not serve the interests of competition and diversity in video programming, and therefore the ban should not be lifted.

## I. THE COMMENTS OVERWHELMINGLY SUPPORT EXTENDING THE BAN ON EXCLUSIVE CONTRACTS BEYOND THE OCTOBER 5, 2002 "SUNSET" DATE

Parties overwhelmingly support extending the Section 628 ban on exclusive contracts.[2] Several parties echoed RICA members' complaints that programmers are currently discriminating against small and competitive Multichannel Video Program Distributors (MVPDs) as a result of exclusive arrangements.[3] Small and rural video systems are especially vulnerable to

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[2]RICA, American Cable Association (ACA), National Rural Telecommunications Association (NRTC), Everest Midwest Licensee LLC, dba Everest Connections Corp. ("Everest"), RCN, World Satellite Network, Inc., Joint Comments (wireline broadband, wireless cable and private cable operators), Qwest Broadband Services, Inc. (Qwest) , Independent Multi-Family Council, DirecTV, EchoStar Satellite Corp., American Public Power Association, Competitive Broadband Coalition, Broadband Service Providers, Digital Broadcast Corporation, Carolina Broadband, Gemini Networks, Inc., Braintree Electric Light Dept.(BELD)

[3]Competitive Broadband Coalition at 10-11; Everest at 4-6; ACA at15-16; Joint Comments at 12; Independent Multi-Family Council at 2; BELD at 3.

discriminatory treatment because they have little or no economic leverage over vertically-integrated programmers.[4] Given their lack of economic leverage, absent a ban on exclusive contracts between vertically integrated operators and programmers, small video competitors would be denied access to programming.[5] AT&T, which operates one of the largest cable companies in the country, freely admits that access to programming would be denied if the Section 628 ban on exclusive contracts were lifted.[6]

Based on their current experience with programmers, small and rural MVPDs logically conclude that programming currently provided will be withheld in favor of affiliated MSOs if the Section 628 ban is lifted. This includes local sports programming and other "brand name" programming, which is crucial to the survival of any competitor in the MVPD market.[7] Programming vendors readily admit that the are providing programs on more favorable terms to incumbent operators than to new entrants. [8] MVPDs that are denied access to popular

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[4]ACA at 3.

[5]ACA provides examples of ten smaller cable operators whose channel line-up is heavily comprised of cable-affiliated satellite programming, and risk losing 31% to 42% of their satellite channels if affiliated programming were withheld. ACA at 6-11.

[6]AT&T at 13-14. See also Section III, *infra*.

[7]See, e.g., Broadband Service Providers Association at 13; Independent Multi-Family Council at 2; RCN at 14-19.

[8]"In some instances, programming vendors have expressly admitted that they apply substantially less favorable terms and conditions to Qwest, as a new entrant, than are offered to incumbent MSOs" Qwest at 3-4 citing discriminatory treatment by vertically integrated and non-vertically integrated programmers in the areas of copyright terms, being forced to carry all of a programmer's networks, ten-year contract terms, onerous terms for carriage of ESPN, denial of access to programming for technical trials.

programming have little chance of surviving.[9]

The record clearly shows that allowing the ban on exclusive contracts to expire would therefore pave the way for programmers to further withhold critical programming from competitors, and would lead to a less competitive video market.

## II. CONSOLIDATIONS IN THE VIDEO MARKETPLACE MAKE IT LESS COMPETITIVE, NOT MORE COMPETITIVE

Just weeks after the comments in this proceeding were filed, AT&T and Comcast announced plans to merge and become the largest cable operator and the largest MVPD nationwide.[10] This recent development alone underscores the argument of RICA and others, that the cable industry is far more consolidated than ten years ago, when Congress enacted the prohibition against exclusive contracts, and thus the market is more susceptible to anti-competitive practices. AT&T's announcement followed a major consolidation in the DBS segment of the video market.[11] These consolidations will further diminish competitors', especially

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[9]ACA at 6-11; Joint Comments at 8, 12; Qwest at 6, Competitive Broadband Coalition at 14-15, Carolina Broadband, Inc. at 4.

[10]On December 20, 2001 Comcast entered into an agreement with AT&T to acquire AT&T's cable operations, AT&T Broadband. The deal is valued at $67 billion (stock and assumption of debt). The resulting company will reach 22.2 million subscribers, almost one fourth of all homes nationwide. *New York Times*, "How the Deal Came Together," Dec. 21, 2001, Section C1.

[11] Just one week earlier, EchoStar and Hughes Electronics Corporation, which controls DirecTV, agreed to merge their DBS operations. If the merger goes through, it would result in an entity that serves 17 million subscribers nationwide. License transfers in connection with the deal are alrady pending before the Commission. *EchoStar Communications Corp., General Motors Corp., and Hughes Electronics Corp. Sek FCC Consent for a Proposed Transfer of Control*, CS Docket No. 01-348, DA 01-3005, rel. Dec. 26, 2001.

small competitors' ability to obtain critical programming on reasonable terms and conditions. In this environment, the Section 628 ban is even more crucial to promoting competition.

Against the backdrop of consolidations are the protestations of the large, incumbent cable operators that they are less powerful because their enormous share of the MVPD market has shrunk from 95% to *only* 80 % , with DBS gaining steadily. Thus, large cable operators claim that they are not in a position to impede competition and should be allowed to enter into exclusive contracts for programming. Large cable operators describe the competition in the video market using words such as "strong," "vibrant," and "vigorous,"[12] generally citing DBS as a chief competitor, and one that is not "shackled" by the Section 628 ban on exclusive contracts.[13] On that basis, they ask that the ban be lifted so that they, large incumbent cable operators, may compete on an equal plain with other MVPDs.[14]

By any standard, a marketplace in which one segment controls 80% of the market is not competitive. Moreover, the record of anti-competitive pricing and outright denial of programming to competitors belies the argument that the large, incumbent cable operators cannot and do not get favorable treatment from programmers.

Despite the decline in cable market share, and the inroads of DBS, large cable companies still control an overwhelming majority of the MVPD marketplace. As one commenter aptly

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[12] Comcast at 2; NCTA at 5; AT&T at 16.

[13]The growth of DBS does not demonstrate that the *local* video market is competitive. See Competitive Broadband Coalition at 9-15.

[14]See, Comcast, AT&T, CableVision.

described the MVPD market, there is "a chronic lack of real competition."[15] For this reason, the ban on exclusive contracts is still necessary.

As parties have demonstrated, given the imminent, further consolidation of regional and national MVPDs, if the prohibition on exclusive contracts were to be lifted, local competitors, who have little or no leverage over pricing and programming, will likely be denied access to programming, thereby defeating the purpose of the program access rules.

## III. LARGE, INCUMBENT CABLE OPERATORS DO NOT DENY THAT EXCLUSIVE ARRANGEMENTS WILL LIMIT COMPETITORS' ACCESS TO PROGRAMMING

The is ample evidence that exclusive arrangements have resulted in discrimination against smaller MVPDs. If the Section 628 ban were lifted, AT&T acknowledges that "exclusive deals will mean that some MVPDs' access to certain programs will be limited."[16] Yet, AT&T contends that the Commission should not be concerned about such discrimination, because while it negatively effects competitors, it does not negatively effect competition.[17] According to the large cable operators, lifting the ban on exclusive contracts is good for competition and program diversity. Unfortunately, the comments, which document discrimination against new market entrants, is at odds with this conclusion. The Commission should rely on this record evidence and continue the ban on exclusive contracts by cable-affiliated programmers.

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[15]Independent Multi-Family Council at 2.

[16]AT&T at 13.

[17]AT&T at 14.

## IV. NEITHER THE COMPLAINT PROCESS, NOR ANTITRUST ENFORCEMENT IS AN ADEQUATE SUBSTITUTE FOR THE SECTION 628 BAN ON EXCLUSIVE CONTRACTS

As the record shows, the reason for the Section 628 ban against exclusive contracts is just as valid today as when it was enacted. The Commission has the legal authority and the factual basis for retaining the ban. There is no more narrowly tailored means of prohibited anti-competitive practices than the ban. The FCC complaint process, or the Department of Justice's antitrust enforcement process, which some parties have suggested are adequate protections against anti-competitive behavior by vertically integrated cable programmers, do not address the problem as directly as the Section 628 ban. One of the largest cable operators - AT&T - admitted that some MVPDs are likely to be denied access programming if the ban is lifted. What better direct evidence that the ban is necessary to protect against denial of access to programming?

Furthermore, by the time either of these enforcement mechanisms run their course it will be too late to salvage a competitor that has lost subscribers because it cannot obtain certain programming. Thus, the Commission should retain the Section 628 ban as a preventative measure, and not rely on procedures that may punish, but will not reverse anti-competitive effects of denial of programming to competitive entities.

## IV. PARTIES SUPPORT RICA'S CALL FOR STEPPED-UP ENFORCEMENT OF DISCRIMINATORY PRACTICES IN THE MVPD MARKETPLACE AND FOR EXTENDING THE BAN AGAINST EXCLUSIVE CONTRACTS TO NON-TERRESTRIAL PROVIDERS

RICA and others demonstrate various types of discriminatory behavior that is contrary to the goals of Section 628, specifically increasing "the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to

receive such programming...."[18] Further examples of ways in which video programmers exercise discriminatory behavior towards small MVPDs include programmers placing restrictions in their contracts that are not found in contracts with larger operators, and programmers "testing" their programming with larger operators, but not smaller competitors. These practices provide a significant competitive advantage to large, incumbent cable providers. As reported by RICA and other commenters, in rural markets in particular, small competitors experience difficulty in obtaining various types of programming, including AT&T's HITS product.[19] For these reasons, RICA and others urge the FCC to expand the ban on exclusive contracts to include non-terrestrial providers and to take a more aggressive stance against anti-competitive behavior in the video marketplace.[20]

## VI. CONCLUSION

The critical factor in the Commission's determination of whether to extend the Section 628 ban on exclusive contracts is whether the video marketplace is competitive. On this issue, the evidence is clear. The marketplace is not competitive. Moreover, the recent announcements of even greater consolidation in the video market demonstrates that the market will be even less competitive. Under these conditions, the only conclusion that the Commission can reach is that

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[18]18 U.S.C. Sec. 548(a).

[19]See RICA at 7-8; Competitive Broadband Coalition at 10-11.

[20]For example, the Commission should examine abuses by broadcasters and affiliated satellite programmers, and expand access protection to non-terrestrial delivery systems. See ACA at 17.

the video market is not competitive and therefore the Section 628 ban on exclusive contracts should be extended.

Further, based on the record of discrimination in access to programming and in price discrimination, the Commission should institute additional measures to prohibit such anti-competitive practices, such as extending the ban on exclusive contracts for MVPD programming to non-cable MVPDs.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Naomi Adams, of Kraskin, Lesse & Cosson, LLP, 2120 L Street, NW, Suite 520, Washington, DC 20037, do hereby certify that a copy of the foregoing "Reply Comments of the Rural Independent Competitive Alliance" was served on this 7th day of January 2002, via hand delivery or first class, U.S. Mail, postage prepaid to the following parties:

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